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ARGUMENT[1]

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE PLAINTIFF WAS PREJUDICED BY JUROR MISCONDUCT IN THAT ONE OF THE JURORS VISITED THE SCENE OF THE ACCIDENT DURING THE COURSE OF THE TRIAL

1. The Burden of Proof and the Trial Court's Abuse of Discretion

Despite the arguments of Defendants Hulse and Apex (hereinafter collectively referred to as "Defendants"), the parties agree that this case is before this Court on an abuse of discretion standard. Plaintiff stated in the first paragraph of the argument section of his substitute brief that the standard of review in this case is an abuse of discretion standard. (Plaintiff's Substitute Brief, p. 21). Thus, there is no dispute regarding the standard of review. However, Defendants fail to recognize that the existence of a presumption of prejudice in the underlying proceedings has a significant impact upon the application of the abuse of discretion standard.

[1] Citations to the Legal File and the Transcript are designated by the abbreviations "LF__" and "TR__."

Defendants are quite correct in their assertion that Plaintiff bears the burden of establishing that the trial court abused its discretion in denying Plaintiff's motion for new trial. Plaintiff has never claimed otherwise. What Plaintiff has done, in his briefing before this Court and before the Court of Appeals for the Western District, is to emphasize that in the underlying proceedings Defendants had the burden of establishing that prejudice did not result from Juror Zink's misconduct. The burden of Defendants in the underlying trial court proceedings necessarily affects the abuse of discretion analysis in this Court.

Pursuant to this Court's decision in Middleton v. Kansas City Public Service Co., 152 S.W.2d 154 (Mo. 1941), once a party has established that juror misconduct occurred, the burden shifts to the opposing party to show that no prejudice resulted from the juror misconduct. Id. at 158. Thus, if a defendant fails to meet its burden of establishing that no prejudice resulted in proceedings on a motion for new trial, then the plaintiff is entitled to a new trial. If the trial court properly applies the presumption of prejudice, and finds that there was juror misconduct, but denies a plaintiff's motion for new trial, this necessarily means that the trial court found that the defendant met its burden of establishing that no

prejudice resulted from the juror misconduct.

In this case, the trial court specifically found that Juror Zink's actions constituted juror misconduct. (TR 61). However, the trial court denied Plaintiff's motion for new trial. Plaintiff avers that the trial court abused its discretion in one of two ways: (1) the trial court failed to apply the presumption of prejudice mandated by Middleton and erroneously placed the burden on Plaintiff to establish the existence of prejudice, or (2) the trial court found that Defendants met their burden of establishing that no prejudice resulted from Juror Zink's misconduct although there was not sufficient evidence to support this conclusion. The first type of abuse of discretion is self-explanatory: if the trial court applied the wrong legal standard then the trial court abused its discretion in issuing a ruling based upon that incorrect standard. The second type of abuse of discretion bears further examination.

Plaintiff devotes a substantial portion of his substitute brief to examining the evidence presented to the trial court and the insufficiency of that evidence to overcome the presumption of prejudice. Plaintiff engages in this analysis because the crucial question in this case is whether there was sufficient evidence to overcome the presumption of prejudice. Defendants attempt to turn this standard around by arguing that there was

no evidence to support a finding of prejudice. The response to this argument is simple: there was a presumption of prejudice before the trial court so Plaintiff was not required to establish that prejudice arose from Juror Zink's misconduct. To the contrary, it was Defendants' burden to establish that there was sufficient evidence to support a conclusion that no prejudice resulted from Juror Zink's misconduct.

The only evidence presented in this case regarding the issue of whether prejudice arose from Juror Zink's misconduct is the testimony of Juror Zink. In Middleton, this Court indicated that the testimony of a juror regarding the juror's own misconduct "ha[s] little probative value because of the common tendency of jurors to minimize the effect of misconduct." Middleton, 154 S.W.2d at 160. More importantly, after noting that the only evidence presented to overcome the presumption of prejudice was the testimony of jurors, the Middleton Court held that such evidence was not sufficient to overcome the presumption of prejudice. Id. The analysis in Middleton is clear: when a presumption of prejudice arises from juror misconduct, and the only evidence that a defendant presents to overcome the presumption of prejudice is the testimony of the juror who engaged in the misconduct, this evidence is insufficient to overcome the presumption of prejudice. Pursuant

to this analysis, Defendants failed to overcome the presumption of prejudice in this case because the only evidence presented was the testimony of Juror Zink. Because there was not sufficient evidence to overcome the presumption of prejudice, the trial court abused its discretion in denying Plaintiff's motion for new trial.

Finally, although Plaintiff does not bear the burden of establishing that prejudice arose from Juror Zink's misconduct, it is worth noting that Juror Zink's testimony, the only evidence presented to the trial court on the prejudice issue, supports the conclusion that prejudice did arise from her misconduct. The sight distance that was available to Defendant Hulse was a pivotal issue at trial and there was a substantial amount of testimony regarding this issue. (Plaintiff's Substitute Brief, Resume of Pertinent Witness Testimony, pp. 12-19). Juror Zink went to the accident scene over the lunch hour during a break in the testimony of Plaintiff's accident reconstruction expert, Dr. Bruno Schmidt. (TR 57). Dr. Schmidt's testimony played a crucial role in the trial in that he testified that Defendant Hulse should have seen Valorie Travis' vehicle and stopped before the second collision occurred. (TR 13). Juror Zink indicated in her testimony that she went to the accident scene because she did not have a good

recollection of the condition of the road at the location of the accident scene and she had questions regarding Defendant Hulse's sight distance. (TR 56-57). Juror Zink further stated that the evidence she obtained at the accident scene "helped [her] better to understand all the testimony." (TR 57-58). If a juror goes to an accident scene to obtain evidence pertaining to a pivotal issue at trial, and acknowledges that she used that evidence to interpret the testimony presented at trial, it is difficult to see how the juror's consideration of the case could not be prejudiced. Juror Zink's testimony establishes that prejudice resulted from her visit to the accident scene.

2. The Issue of the Admissibility of Juror Zink's Testimony is Not Before This Court on Appeal

Although Defendants concede that the present appeal is limited to the issue of whether prejudice resulted from Juror Zink's misconduct (Respondent's Substitute Brief, p. 6), they nonetheless attempt to raise a second issue – the admissibility of Juror Zink's testimony – in the final pages of their substitute brief. This issue is not properly before this Court for the following reasons: (1) Defendants did not object to Juror Zink's testimony at the time that it was offered into evidence, (2) Defendants did not file a cross-appeal with regard

to this issue, and (3) Defendants have not previously raised this issue during the course of the appellate briefing in this case.

Defendants claim that they objected to Juror Zink's testimony in their suggestions in opposition to Plaintiff's motion for new trial. Apparently Defendants are referring to the following statement: "Plaintiff's allegation of juror misconduct in the present case is simply an improper attempt to impeach the jury's verdict." (LF 52) As Plaintiff explained in his substitute brief, this statement does not qualify as an objection to Juror Zink's testimony for two reasons: (1) the statement does not even mention Juror Zink's testimony but instead refers generally to Plaintiff's allegations, and (2) the statement was made days before Plaintiff ever offered Juror Zink's testimony into evidence.

Plaintiff indicated in his substitute brief that this situation is analogous to the common situation in which a party objects to a particular type of testimony in its motion in limine but then fails to make an objection to the specific testimony when it is offered into evidence. Under these circumstances this Court has held that such objections do not preserve any issue for appeal because an objection must be made at the time that evidence is offered. See, e.g., State v. Copeland, 928 S.W.2d 828, 848 (Mo. Banc 1996). Defendants argue that this analogy is not appropriate because "[t]he purpose of a motion in limine is to point out to the court and to opposing counsel anticipated

evidence which may be objectionable." (Respondent's Substitute Brief, p. 21). Plaintiff contends that this was exactly the point of above-quoted statement. Assuming arguendo that the above-quoted statement can be interpreted as referring to Juror Zink's testimony, this statement could only to serve to point out the objectionable nature of anticipated evidence because Plaintiff had not offered Juror's Zink's testimony at the time this statement was made.

Defendants are correct in their statement that "[i]t is well settled that a juror may not be allowed to impeach the jury's verdict." (Respondent's Substitute Brief, p. 21). However, it is equally well settled that a party who fails to timely and properly object to such juror testimony waives the right to complain of the consideration of such testimony. See, e.g., Cook v. Kansas City, 214 S.W.2d 430, 434 (Mo. 1948); Stotts v. Meyer, 822 S.W.2d 887, 890 (Mo. App. 1991). In this case, Defendants failed to object to Juror Zink's testimony at the time it was offered into evidence, so Defendants have waived the right to complain of the trial court's consideration of Juror Zink's testimony on appeal.

Even more important is the fact that Defendants have not appealed the issue of the admissibility of Juror Zink's testimony. Defendants have not filed any cross-appeal in this case and Plaintiff does not appeal the trial court's admission of Juror Zink's testimony. Thus, the issue of whether Juror Zink's testimony was properly admitted is not presented in this appeal. In fact, in the underlying briefing before the Court of Appeals for the Western District, Defendant did not address this issue at all. As a general

rule, courts will not consider allegations of trial court error made by the respondent in an appeal unless the respondent has filed a cross-appeal. See, e.g. First National Bank of Forth Smith v. The Kansas City Southern Railway Co., 865 S.W.2d 719, 735 n.8 (Mo. App. 1993). Moreover, this Court has frequently indicated that "[p]oints raised for the first time on appeal are not preserved for review." Artman v. State Board of Registration for the Healing Arts, 918 S.W.2d 247, 252 (Mo. Banc 1996).

In short, Defendants did not object to Juror Zink's testimony at the time it was offered into evidence and they have not taken appropriate steps to appeal this issue. Having failed to preserve this issue for appeal, Defendants cannot attempt to revive the issue at this late stage in the appellate process.

III. The Decisions in Middleton, Stotts and Douglass are Controlling

Defendants attempt to avoid the standards stated in the Middleton decision by pointing out that the Middleton decision was issued in 1941. (Respondent's Substitute Brief, p. 12). Apparently Defendants would have this Court simply disregard decisions that it issued in the 1940's and earlier. Defendants do not cite to any case that overrules Middleton because there is no such case. Instead, Defendants cite to an opinion of the Court of Appeals for the Western District, Mathis v. Jones Store Co., 952 S.W.2d 360 (Mo. App. 1997), that they argue rejects the standards set forth in Middleton.

To the best of Plaintiff's knowledge, decisions of this Court that have not been

overruled continue to be the law in this state regardless of their age. Indeed, if this Court were to disregard every decision that was issued more than sixty years ago a substantial amount of precedent would be lost in the process. And it goes without saying that the lower appellate courts of this state cannot overrule the decisions of this Court. The Middleton decision is the controlling law in this state with regard to the standards for addressing juror misconduct of the type that is present in this case.

Defendants also contend that the decisions in Stotts v. Meyer, 822 S.W.2d 887 (Mo. App. 1991), and Douglass v. Missouri Cafeteria, Inc., 532 S.W.2d 811 (Mo. App. 1975), are not applicable because those cases involved factual scenarios in which the juror who visited the scene of the accident subsequently shared this information with other jurors. However, a close reading of Stotts and Douglass indicates that the finding of prejudice in those cases did not depend upon the fact that the information was shared with other jurors.

In Stotts, the court stated that "[u]pon examining the record we are of the opinion that juror Flippo's unauthorized viewing and visit to the parties' accident site was prejudicial to the appellant." Stotts, 822 S.W.2d at 891. The court then went on to indicate that the facts establishing communication of this outside information to other jurors constituted further evidence supporting a finding of prejudice. Id. The court did not hold that a finding of prejudice required evidence of communication of outside information to other jurors. Rather, the court appeared to view the mere fact of the visit

to the scene as sufficient to support the presumption of prejudice, and recognized that the fact that the juror communicated outside information directly to the other jurors made the prejudice more egregious.

The court in Douglass did not discuss the matter of evidence of prejudice with the same detail that is found in the Stotts decision. However, the Douglass court clearly indicated that it viewed the holding in Middleton as controlling. Douglass, 532 S.W.2d at 813. Significantly, the Middleton case did not involve any communication of outside evidence to other jurors because the jury voted without any prior discussion. Middleton, 152 S.W.2d at 156. Thus, the Douglass court, depending on the analysis in Middleton, apparently did not view evidence of communication to other jurors as determinative.

Defendants also contend that the juror misconduct in this case is not analogous to the juror misconduct that was at issue in Middleton. Without getting bogged down in a detailed fact-by-fact comparison, Plaintiff suggests that Defendants have failed to recognize the broader principle that underlies the decisions in Middleton, Stotts and Douglass: prejudice is presumed when a juror actively seeks evidence other than that adduced at trial. The factual scenario may vary depending upon the particular actions that a juror takes to improperly obtain evidence other than that adduced at trial, but the same basic standard applies in all of these cases. Defendants come close to recognizing this point when they quote the Middleton Court's finding of "an affirmative purpose to reject the evidence in the record and get information outside of the record."

(Respondent's Substitute Brief, pp. 14-15, quoting Middleton, 152 S.W.2d at 159). Plaintiff contends that Juror Zink exhibited such an "affirmative purpose" in this case and that the analysis from Middleton is directly on point.

4. Juror Zink's Testimony is Not Sufficient to Overcome the Presumption of Prejudice

As Plaintiff explained in his substitute brief, the Middleton Court held that the testimony of a juror who commits misconduct is of little probative value for purposes of overcoming the presumption of prejudice that arose from that misconduct. Middleton, 152 S.W.2d at 160. Nevertheless, Defendants argue that it is somehow improper for a court to consider a juror's factual testimony regarding the occurrence of misconduct while discounting the juror's denial that the misconduct had any impact. In reality, this distinction between the juror's factual testimony and opinion testimony makes perfect sense.

If a juror testifies that she has engaged in a specific act of misconduct – such as visiting the scene of an accident – there is no reason to expect any inherent bias in this admission. Indeed, this situation could be viewed as analogous to an admission against interest. Because the juror is admitting an activity that will presumably be viewed negatively, there is all the more reason to believe that the juror's

admissions are truthful because the juror would be unlikely to make up facts that reflect upon her negatively. However, if a juror denies that her misconduct had any impact upon her deliberations – in effect attempting to minimize the impact of her misconduct – there is reason to suspect that this denial is biased because the denial is self-serving.

A juror understandably wants to believe that she has not done anything wrong and that she has deliberated in a fair and impartial manner. Perhaps more important, a juror wants the court to believe this. With these feelings in play, the tendency of a juror to deny the impact of her misconduct is merely human nature. This Court recognized this point in Fitzpatrick v. St. Louis-San Francisco Railway Co., 327 S.W.2d 801 (Mo. 1959), stating as follows: "The arousing of sympathy or prejudice is often so subtle that the person affected is the last to become aware of it or admit its existence. Otherwise, the reaction of the average person would be resentment. It is for the court and not the jurors to say whether they are likely to have been influenced by [the occurrence in question]." Id. at 807.

Taking this aspect of human nature into account, this Court indicated in Middleton that a juror's denial of influence from the juror's own misconduct is to be given little weight.

Defendants claim that Plaintiff has misread Middleton and argue that Middleton does not indicate that a juror's denial of influence by extraneous evidence should be given little weight. Plaintiff believes that the Middleton decision speaks for itself and that the above-quoted language from this Court's later decision in Fitzpatrick only reinforces the general rule stated in Middleton.

Finally, Defendants argue that it is improper for an appellate court to instruct a trial court to give a certain type of testimony little weight because the trial court is in the best position to determine the credibility of witnesses. (Respondent's Substitute Brief, p. 17). Plaintiff would simply note that it is not at all uncommon for appellate courts to adopt rules indicating that certain types of testimony should be given little weight. See, e.g., Montgomery v. Montgomery, 18 S.W.3d 121, 124 (Mo. App. 2000) (Noting the general presumption that separate property transferred from one spouse to both spouses becomes marital property, and indicating that self-serving testimony of one spouse that the transfer was not intended as a gift is to be given little weight); Clark v. Clark, 919 S.W.2d 253, 255 (Mo. App. 1996) (Recognizing the same point).

5. The Middleton Standard Applies When a Juror has Engaged in Purposeful Activity that Constitutes Misconduct

Defendants suggest that, if this Court recognizes that Juror Zink's misconduct resulted in prejudice, "virtually every

visit by a juror to an accident scene during trial, no matter how innocent, would result in a new trial." (Respondent's Substitute Brief, p. 17). This argument completely ignores the facts of this case and the analysis in Middleton regarding the presumption of prejudice.

Let there be no mistake, this case does not involve a scenario in which a juror innocently passed by an accident scene in the course of her daily travels. Juror Zink stated that she went to the accident scene, in the course of a lunch break during trial, for the specific purpose of examining the accident scene. (TR 57). She indicated that she had questions regarding the sight distance that was available to Defendant Hulse at the scene of the accident and that she went to the accident scene to examine the incline of the road. (TR 57). The incline of the road at the accident scene, and the effect that this incline had upon the sight distance of Defendant Hulse, was a pivotal issue at trial. (Appellant's Substitute Brief, Resume of Pertinent Witness Testimony, pp. 12-19). Thus, Juror Zink went to the accident scene with an affirmative purpose of obtaining evidence on a pivotal issue other than the evidence that was provided at trial.

Defendants acknowledge that Juror Zink's misconduct was deliberate. (Respondent's Substitute Brief, p. 17).

Nevertheless, Defendants argue that application of the presumption of prejudice in this case would result in a presumption of prejudice every time that a juror passes by an accident scene. This argument is disingenuous at best.

As Plaintiff noted in his substitute brief, there could be no presumption of prejudice in instances when a juror innocently passes by an accident scene because there would be no misconduct. Defendants attempt to avoid the distinction between innocent juror conduct and purposeful juror misconduct, arguing that Plaintiff has not cited any case law to support such a distinction. Plaintiff would think that this distinction is a matter of common sense. Furthermore, the Middleton case specifically indicates that the presumption of prejudice arises only when the juror's conduct discloses "an affirmative purpose to reject the evidence in the record and get information outside the record." Middleton, 152 S.W.2d at 159. This standard necessarily recognizes a distinction between innocent conduct and purposeful misconduct.

It is also worth noting that Defendants' doomsday prediction that the courts will be inundated by new trials fails to take into account the unusual circumstances in this case regarding the admission of Juror Zink's testimony. As Plaintiff has previously explained in his substitute brief and in this

reply, Juror Zink's testimony was admitted in this case because Defendants failed to object to her testimony at the time it was offered into evidence. As both parties have recognized, the general rule is that a juror's testimony may not normally be used to impeach the jury's verdict. Kemp v. Burlington Northern Railroad Co., 930 S.W.2d 10, 13 (Mo. App. 1996). If Defendants had objected to Juror Zink's testimony at the time it was offered into evidence, that testimony most likely would not have come into evidence and the parties would not be engaged in the present dispute regarding the presumption of prejudice.

In most cases an objection will be made to the presentation of juror testimony and the court will never reach the issue of prejudice because there will be no evidence of misconduct. Thus, this case is the exception and not the rule. In light of the narrow set of circumstances in this case that allowed the issue of prejudice to receive a full hearing, it is not at all likely that this Court's decisions in this case will result in an increase in the number of new trials granted as the result of juror misconduct. To resolve any doubt about this conclusion, Plaintiff would simply point out how rarely this factual scenario has been addressed in the sixty years since the Middleton decision was issued.

6. Juror Zink did Obtain New Evidence as the Result of Her Visit to the Accident Scene

Defendants argue that a new trial is not warranted in this case because Juror Zink did not obtain any new evidence from her visit to the accident scene but merely "refreshed" her memory. (Respondent's Substitute Brief, p. 19). Putting fine semantic distinctions aside, Plaintiff contends that if a juror does not have a specific fact available to her before visiting the accident scene, and has that fact available to her after visiting the accident scene, then for purposes of the trial the juror has obtained new evidence. The important consideration is that the juror's visit to the accident scene provided the juror with evidence other than the evidence that was made available to the juror at trial.

Defendants also claim that Plaintiff has failed to explain his contention that the rule regarding a juror obtaining new evidence, as stated in Rogers v. Steuermann, 552 S.W.2d 293 (Mo. App. 1997), is not applicable in this case. Aside from the explanation that Plaintiff just provided – that Juror Zink did, in fact, obtain new evidence during her visit to the accident scene – Plaintiff refers this Court to his analysis on page 39 of his substitute brief. Ironically, Defendant cites to this very page of Plaintiff's substitute brief, but fails to

recognize the explanation that is stated at the top of that page. That explanation states, in summary, as follows: (1) Middleton recognized the line of cases indicating that a new trial is not necessary when no new evidence has been obtained, (2) Rogers is a later addition to this line of cases, (3) Middleton indicated that this line of cases does not apply where a juror has actively sought evidence other than that adduced at trial, (4) Juror Zink actively sought evidence other than that adduced at trial, and (5) the rule stated in Rogers is not applicable in this case pursuant to the holding in Middleton that the rule regarding new evidence does not apply in cases of this type.

CONCLUSION

The trial court abused its discretion in denying Plaintiff's motion for new trial in that the trial court either (1) failed to apply the presumption of prejudice required by Middleton or (2) found that Defendants overcame that presumption even though there was insufficient evidence to support such a conclusion. There is no question that Juror Zink engaged in misconduct. Likewise, there is no question that Juror Zink obtained evidence other than that adduced at trial and that this evidence pertained to an issue that was pivotal at trial. The only evidence presented on the issue of prejudice was the

testimony of Juror Zink, and this Court indicated in Middleton that the testimony of a juror regarding that juror's own misconduct should be given little weight. Defendants had the burden of overcoming the presumption of prejudice that arose from Juror Zink's misconduct and, based upon the available evidence, there is no basis for the trial court to conclude that Defendants have met this burden. Therefore, the trial court's order denying Plaintiff's motion for new trial should be reversed and this case should be remanded for a new trial.

Respectfully Submitted

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